STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 18, 2006
v	No. 255255 Wayne Circuit Court
ANTRELL VONIQUE BROWN, Defendant-Appellant.	LC No. 04-001097-01

Before: Fort Hood, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced, as a third habitual offender, MCL 769.11, to six to twenty years in prison for his assault with intent to do great bodily harm less than murder conviction, one and half to five years in prison for his felon in possession of a firearm conviction, and two years in prison for his felony-firearm conviction. He appeals as of right. We affirm.

Defendant's first issue on appeal is that the trial court violated his constitutional protections against double jeopardy when it sentenced him to six to twenty years in prison for assault with intent to commit great bodily harm less than murder because the trial court had already acquitted defendant of his assault with intent to commit great bodily harm less than murder charge. We disagree. Defendant failed to properly preserve this issue for appeal, and thus, we will review this issue for plain error which affected defendant's substantial rights. *People v Meshell,* 265 Mich App 616, 628; 696 NW2d 754 (2005).

The United States and Michigan Constitutions protect a defendant from the finality of judgments by declaring that a defendant cannot be prosecuted for the same offense after acquittal or conviction, and cannot be punished more than once for the same offense. *People v Brower*, 164 Mich App 242, 244; 416 NW2d 397 (1987). Jeopardy attaches in a bench trial once the first witness is sworn. *Id*. at 246. Furthermore, once a verdict of acquittal has been rendered, jeopardy attaches even if a judgment does not follow. *People v Jones*, 203 Mich App 74, 82; 512 NW2d 26 (1993).

Here, the trial judge summarized the parties' arguments and the evidence that had been presented to him, which included the fact that defendant shot at and hit the victim. The trial

judge went on to state that he did not believe defendant possessed the intent to kill because he did not shoot at the victim's head or chest and, in turn, the trial judge concluded that defendant was not guilty of assault with intent to murder. Before concluding that defendant was not guilty of assault with intent to murder, the trial judge stated, "if you shoot someone in the leg, or the foot, or even the finger, there certainly is an assault that's been committed – Great Bodily Harm Less Than Murder . . . And there's no doubt the defendant shot the complainant." The trial judge went on to find defendant guilty of count three, felon in possession of a firearm, and count five, felony-firearm, before stating that defendant was "not guilty of Count-Two and Count Four, which are alternative counts." Count two of defendant's charge was assault with intent to commit great bodily harm less than murder and count four was felonious assault. Defendant argues that the trial judge's statement, "not guilty of Count-Two," equated to a finding of not guilty of assault with intent to commit great bodily harm less than murder, and when the trial judge subsequently sentenced defendant to six to twenty years in prison for assault with intent to commit great bodily harm less than murder, defendant's constitutional protections against double jeopardy were violated.

Taking the trial judge's findings of fact and conclusions of law as a whole, we conclude that the trial judge clearly found that defendant shot at the victim and, in turn, was guilty of assault with intent to commit great bodily harm less than murder. We conclude that the trial judge clearly meant to state that defendant was not guilty of the alternative charges of assault with intent to murder and felonious assault (counts one and four), and merely made a mistake when he said that he was finding defendant "not guilty of Count-Two." Furthermore, a court speaks through its orders and not its oral pronouncements or opinions. *People v Vincent*, 455 Mich 110, 123; 565 NW2d 629 (1997); MCR 2.602(A). A judgment does not become effective until it is reduced to writing and signed. *Id.* Here, the trial judge's "Order and Conviction of Sentence" corroborates our opinion that the trial judge found defendant guilty of assault with intent to do great bodily harm less than murder. Therefore, we conclude that the trial court never acquitted defendant of assault with intent to commit great bodily harm less than murder, and thus, defendant's constitutional protections against double jeopardy were not violated when defendant was sentenced to six to twenty years in prison for assault with intent to commit great bodily harm less than murder. *Vincent, supra*, p 123; *Jones, supra*, p 82.

Defendant's second issue on appeal is that his third habitual offender sentence enhancement should be set aside because the prosecution failed to meet the filing and notice requirements of MCL 769.13. In turn, defendant argues that his six- to twenty-year sentence for assault with intent to commit great bodily harm less than murder exceeds the statutory maximum sentence for that offense, and thus, should be set aside. We disagree.

Defendant failed to properly preserve this issue by raising it at sentencing or in a motion for resentencing, and thus, this Court will review this issue for plain error which affected defendant's substantial rights. *People v Wyrick*, 265 Mich App 483, 489; 695 NW2d 555 (2005), vac'd in part on other grounds 474 Mich 947 (2005). This Court should reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In a criminal action, the prosecuting attorney may seek to enhance a defendant's sentence "by filing a written notice of his or her intent to do so within 21 days after the defendant's

arraignment on the information charging the underlying offense." MCL 769.13(1). The notice to enhance a defendant's sentence shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement, and shall be filed with the court and served upon the defendant or his or her attorney within the allotted time provided in MCL 769.13(1). *People v Morales*, 240 Mich App 571, 575; 618 NW2d 10 (2000); MCL 769.13(2). Furthermore, the prosecution shall file a written proof of service with the clerk of the court. *Id*.; MCL 769.13(2). The failure to file the proof of service with the clerk of the court constitutes harmless error if it is clear that the defendant had notice of the prosecution's intent to seek enhancement. *People v Walker*, 234 Mich App 299, 314-315; 593 NW2d 673 (1999). Additionally, before sentencing a defendant as a habitual offender, the existence of the defendant's prior convictions must be determined by the court at sentencing or at a separate hearing before sentencing. *People v Green*, 228 Mich App 684, 699; 580 NW2d 444 (1998); MCL 769.13(5). The prior convictions may be established by any evidence that is relevant, including information contained in the presentence report. *Id*.; MCL 769.13(5).

"The purpose [behind the old common law rule] of requiring a prosecutor to proceed 'promptly' to file the supplemental information [that an accused is being charged as a habitual offender] . . . not more than 14 days after the defendant is arraigned in Circuit Court," was to "provide the accused with notice, at an early stage in the proceedings, of the potential consequences should the accused be convicted" of the charged offense(s). *Morales, supra*, 240 Mich App 582. Likewise, we conclude that the purpose of the modern statutory requirement that the prosecution must file a written notice of its intent to seek an enhanced sentence "within 21 days after the defendant's arraignment," is to provide the accused with notice at an early stage in the proceedings that if convicted of the charged crimes he will receive an enhanced sentence.

Here, defendant's prior convictions were established by being listed in defendant's presentence investigation report and being stipulated to at the January 21, 2004, preliminary examination; and thus, the requirements of MCL 769.13(5) were met. *Green, supra*, p 699. Furthermore, since the July 19, 2003, "Felony Information" states that defendant is being charged as a third habitual offender, and lists what defendant's prior convictions were, defendant was on notice that if convicted of the charged crimes he could receive an enhanced sentence. Defendant was arraigned on January 9, 2004, and defendant's felony information (charge) is dated July 19, 2003. Thus, not only was defendant on notice that he would be charged as a third habitual offender "within 21 days" of his arraignment, he was actually on notice that he was going to be charged as a third habitual offender well before he was arraigned. Therefore, taking the intent behind MCL 769.13(1) into consideration, we conclude that the requirements of MCL 769.13(1) and (2) were met. *People v Hornsby*, 251 Mich App 462, 470; 650 NW2d 700 (2002); *Morales, supra*, pp 575, 582. Finally, even though the lower court record does not contain any proof that the prosecution filed "proof of service" upon defendant with the clerk of the court, such omission constitutes harmless error because the "Felony Information," the January 21, 2004, preliminary examination, and the fact that defendant never objected at sentencing to the fact that he was being sentenced as a third habitual offender, all establish that defendant was on notice that he was being sentenced as a third habitual offender. *Walker, supra*, pp 314-315. Thus, we conclude that it was not plain error for the trial judge to fail to sua sponte set aside defendant's third habitual offender sentence enhancement.

An assault with intent to commit great bodily harm less than murder conviction has a maximum sentence of ten years in prison. MCL 750.84. However, if a defendant is being sentenced as a third habitual offender for an offense that is punishable "by imprisonment for a term less than life," a sentencing court may double the defendant's maximum prescribed sentence. MCL 769.11(1)(a). Therefore, defendant's 20-year maximum sentence for assault with intent to commit great bodily harm less than murder was proper in this instance. MCL 750.84; MCL 769.11(1)(a).

Defendant's third issue on appeal is that he was denied his constitutional right to the effective assistance of counsel. We disagree. When reviewing a claim of ineffective assistance of counsel, when an evidentiary hearing is not previously held, this Court's review is limited to the facts contained on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). As a matter of constitutional law, this Court reviews the record de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id*. at 302. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which a court will not review, with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. *Id*. Furthermore, counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Here, as discussed above, the trial court did not acquit defendant of assault with intent to commit great bodily harm less than murder, and furthermore, pursuant to the third habitual offender sentencing enhancement, properly sentenced defendant to six to twenty years in prison on his assault with intent to commit great bodily harm less than murder conviction. Therefore, any objection to defendant's assault with intent to commit great bodily harm less than murder conviction and/or subsequent sentence would have been futile. Thus, defense counsel was not ineffective for failing to make such objections. *Ackerman*, *supra*, p 455.

Furthermore, counsel's failure to call res gestae and/or alibi witnesses is presumed to be trial strategy. *Dixon, supra*, p 398. Defendant has done nothing to rebut this presumption and has not provided who should have been subpoenaed as a witness and what they would have testified to. Moreover, defense counsel stated on the record that Sergeant Brown, who is the officer in charge of the case, attempted to locate defendant's alibi witnesses, but the search "was not fruitful." Therefore, defendant's claim that he was denied the effective assistance of counsel because his trial counsel failed to subpoena res gestae or alibi witnesses must fail. *Toma, supra*, pp 302-303; *Dixon, supra*, p 398.

Finally, defendant's claim that he was denied the effective assistance of counsel because his trial counsel failed to adequately cross-examine the prosecution's witnesses also fails. What

questions to ask and not ask on cross-examination are presumed to be trial strategy. *Dixon, supra*, p 398. Defendant has done nothing to rebut the presumption that the questions defense counsel chose to ask and not ask on cross-examination were sound trial strategy and has not provided what questions should have been asked, nor how such questions would have helped impeach the prosecution's witnesses. Moreover, the record reflects that defense counsel rigorously cross-examined the victim regarding his recollection of certain details he testified to. Defense counsel further emphasized the discrepancies between the victim's and eyewitnesses Asata McDowell's and Raquel Wither's respective recollection of events, and even impeached McDowell with a prior statement she made to the police in regard to who the victim told her shot him. Therefore, defendant has failed to rebut the presumption that defense counsel's actions/inactions on cross-examination were sound trial strategy, and furthermore, has failed to establish that defense counsel's actions/inactions on cross-examination fell below an objective standard of reasonableness. Thus, it cannot be found that defendant was denied the effective assistance of counsel on the grounds of failure to adequately cross-examine the prosecution's witnesses. *Toma, supra*, pp 302-303; *Dixon, supra*, p 398.

Defendant's final issue on appeal is that the trial court's verdict was against the great weight of the evidence produced at trial, and thus, the trial court abused its discretion when it denied defendant's motion for a new trial. We disagree. This Court reviews a trial court's denial of a motion for a new trial on the basis that the verdict was not against the great weight of the evidence presented for an abuse of discretion. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003).

"The test [to determine whether a verdict is against the great weight of the evidence] is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). In order to discount testimony that supports a verdict and grant a new trial, the testimony must either contradict indisputable physical facts, or be so patently incredible or inherently implausible that a reasonable juror could not believe it. *Id*. at 643-644.

The elements of assault with intent to do great bodily harm less than murder are: (1) an assault through an attempt or offer with force and violence to do corporal hurt to another with (2) a specific intent to do great bodily harm less than murder. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). Here, McDowell, who drove the victim to the hospital, testified that the victim told her that "Eugene's nephew" shot him, and on cross-examination, McDowell testified that she told the police that the victim told her that "Eugene's cousin" shot him. The victim testified that he knows "Eugene," and that defendant is "Eugene's nephew." Though McDowell's testimony is contradictory, since she did not know who "Eugene" or defendant were, it could be concluded that the fact that she told the police that the victim told her that "Eugene's cousin" shot him, as opposed to "Eugene's nephew," was merely a mistake. Therefore, we conclude that McDowell's testimony was not so deprived of all probative value that the jury should not have believed it. *Lemmon, supra*, pp 645-646.

Moreover, contrary to defendant's assertion that the victim did not identify defendant as the man who shot him, the victim clearly testified that he had a verbal altercation with defendant on July 6, 2003, and saw defendant the very next day on July 7, 2003, sitting on defendant's

grandmother's porch drinking beer. The victim testified that when defendant saw him, defendant ran across the street toward him with a gun in his hand and shot at him three times, one of which hit the victim in the hip. Furthermore, Withers, who lived two houses down from defendant's grandmother's house, gave corroborating testimony about defendant and the victim's verbal altercation on July 6, 2003, and also testified that on July 7, 2003, she was sitting on her porch, heard a shot, looked up and saw the victim lying on the ground and defendant standing over him with a gun pointed at him and then saw defendant fire another shot before running away. Therefore, we conclude that defendant's assault with intent to commit great bodily harm less than murder conviction was not against the great weight of the evidence and a miscarriage of justice will not result by allowing the verdict to stand. *McCray, supra*, p 637.

Furthermore, this Court has interpreted MCL 750.227b to require the prosecution to show "that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). As discussed above, the great weight of the evidence established that defendant committed assault with intent to commit great bodily harm less than murder and possessed a firearm during the commission of that felony. Therefore, defendant's felony-firearm conviction was not against the great weight of the evidence and a miscarriage of justice will not result by allowing the verdict to stand. *McCray, supra*, p 637. Moreover, to convict a defendant of felon in possession of a firearm, in relevant part, the prosecution must establish that a defendant, who had been previously convicted of a specified felony and was not allowed to possess a firearm for a specified amount of time, possessed a firearm within that specified amount of time. MCL 750.224f. Here, the parties stipulated that defendant had been previously convicted of a felony and was not allowed to possess a firearm at the time of the incident in question. The great weight of the evidence established that defendant possessed a firearm during the incident in question. Therefore, defendant's felon in possession of a firearm conviction was not against the great weight of the evidence and a miscarriage of justice will not result by allowing the verdict to stand. *McCray, supra*, p 637.

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Patrick M. Meter